United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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To be argued by
EDWARD R. KORMAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1283

UNITED STATES OF AMERICA,
Appellant,

—against—

SECURITY NATIONAL BANK,
Appellee.

BRIEF FOR THE APPELLANT

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Preliminary Statement

The United States appeals from a judgment, entered upon a jury verdict by the District Court for the Eastern District of New York (Costantino, *J.*) (A. 21), acquitting the Security National Bank of nine counts of an indictment (A. 8) charging it with making illegal contributions in violation of Section 610 of Title 18.

Statement of Facts

A. Introduction

This case raises issues of substantial importance to the effort by Congress to regulate contributions to political campaigns by national banks and corporations. Section 610 of Title 18, during the time period at issue here, made it an offense punishable by a maximum fine of $5,000.00 [1] for national banks and corporations to

[1] In 1974 Congress increased the maximum penalty to $25,000.

make political contributions or expenditures. As used in Section 610, the phrase "contribution or expenditure", to the extent here relevant, was deemed to "include any direct or indirect payment, distribution, loan, advance, deposit or gift of money *** to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section." [2]

The evidence in this case, which we shall shortly detail, established that the individual defendants, who were bank officers, had devised a scheme by which individual officers would be asked to contribute $100.00 a month to be used for political contributions by the Security National Bank. The individual defendants, however, were aware that officers who were being asked to make these contributions were financially unable to do so. Since these contributions were deemed to be essential to the business success of the Security National Bank, particularly its ability to obtain non-interest bearing municipal accounts, the officers asked to make the political contributions were given salary increases of $1,700 a year to cover the cost of the contributions and any additional tax liability. The ultimate cost to the Security National Bank of the scheme, which involved more than forty officers, was several hundred thousand dollars.

So overwhelming was the proof, that the individual defendants and the bank contested little, if any, of the evidence relating to the basic scheme. Instead, the individual defendants claimed, contrary to the testimony

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[2] Section 610 prohibited a national bank from making an expenditure or contribution "in connection with any election to any political office, or in connection with any primary election * * *."

of counsel, that they had been advised by counsel that the scheme was legal if the salary increases were given with intent that they become the permanent property of the bank officers and that, if a bank officer subsequently decided he did not wish to contribute, the increase would not be revoked. Moreover, the Security National Bank, which could not invoke the advice of counsel defense,[3] and the individual defendants, also argued that the advice allegedly received by the individual defendants was good law, i.e., that the scheme was legal because the salary increases were permanent and that the officers were free to stop making contributions at any time without being penalized. Accordingly, they asserted, that the subsequent political contributions made by the officers on behalf of the bank, to beneficiaries chosen by senior bank officers, were the officers' money and not the bank's money. Hence, they argued, there was no violation of Section 610, even though the sole reason the increases were given was to enable officers to make the contributions on behalf of the bank.

The charge of the district court essentially adopted this defense asserted by the bank. Over repeated objection, which included a mid-trial petition for a writ of mandamus, that he was misconstruing the law, Judge Costantino charged the jury that it was an essential element of the offense "[t]hat the contribution charged in the specific count was actually made with bank funds." Since the very nature of the scheme involved the indirect use of bank funds, it is not surprising that the jury acquitted the Security National Bank, and the individual defendants of violating Section 610.

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[3] Section 610 does not require a showing that a corporate defendant act "wilfully", i.e. that it acted with the intent to violate the law. Accordingly, it could not assert an advice of counsel defense. *United States* v. *Bristol*, 473 F.2d 439, 443 (C.A. 5, 1973).

The principal issue raised here, although there is one other, is whether in a case involving a scheme by a national bank to make indirect expenditures of its funds in connection with an election, the United States must prove that the contribution alleged in each separate count of the indictment was "actually made with bank funds."

B. The Manner By Which the Security National Bank Made Political Contributions

1. The Basic Scheme

In the fall of 1967, the three principal officers of the Security National Bank, Patrick J. Clifford, President, David J. Dowd, Senior Vice President and Frank B. Powell, Executive Vice President, concerned about the bank's ability to obtain lucrative non-interest bearing municipal accounts, decided to have the bank make political contributions to the politicians and political organization controlling those accounts (A. 2364-2365). Since they were aware that it was illegal for the bank to make such contributions directly (A. 1724-1725, A. 2264), they devised a system whereby bank officers would seemingly make the contributions on behalf of the bank. Because the bank's officers could not otherwise afford to make contributions to the extent desired, they decided to give them special salary increases of $1700 if the officers agreed to return $100.00 a month for political contributions (A. 2039-2041, A. 1716-1718).

Pursuant to this plan, in late 1967 and early 1968, they selected approximately twenty subordinate bank officers and enlisted their participation (A. 2284-2285,

A. 2287-2288).[4] Each of the officers was told that he had been selected to make political contributions on behalf of the bank; that if he agreed to contribute he would receive a special $1700 salary increase, having nothing to do with merit, but intended to compensate him for the political contributions; that $1200 of the $1700 raise was to pay for the $100 a month contributions he was to make, the remaining $500 was to compensate him for any additional tax liability on the increase (E.g., A. 241-244, A. 297-300). Thus, the contributions would cost the officer "nothing" (E.g., A. 244, A. 2063).[5]

After receiving the increase, the officer remitted one hundred dollars each month to Betty Jaeger, Frank Powell's secretary,[6] who deposited the money into a "special" checking account in her name (Tr. 700, Tr. 711-712). Clifford, Dowd and Powell decided which politicians or political committees would receive the contributions (A. 427-429, A. 663) and those decisions were conveyed to Mrs. Jaeger. She, in turn, would draw political contributions checks on the "special" account as per those instructions (Tr. 712). The officers were

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[4] Twelve of the officers selected to contribute in late 1967 and early 1968 testified at trial. John Fretz, A. 59-100; Winston Hart, A. 101-237; William Sly, A. 238-294; Robert Bradley, A. 295-338; Robert Vandermark, A. 339-416; James Lamberton, A. 416-438; James Brogan, A. 439-573; Charles Dickerson, A. 590-609; Bernard Knoess, A. 610-637; George Brooks, A. 637-658; George Barrie, A. 1208-1252 and Harry Melsha, A. 1409-1444.

[5] Each officer who testified identified the special increase on his payroll record ("visi card"), which was then placed in evidence (E.g., A. 421-422).

[6] Each officer who testified, identified the personal checks which he turned over to Mrs. Jaeger. The checks, which were initially drawn payable either to cash or to Mrs. Jaeger, were received in evidence (E.g., A. 594-596).

never told which politicians or political committees received the money they turned over to Mrs. Jaeger (E.g., Tr. 760, A. 260, A. 353-354). The contributions continued in this manner through 1968 and 1969 until the spring of 1970. During this time several officers were added to the contributions system, and with one exception, given special $1700 salary increases.[7]

In the spring of 1970, it was decided that the political contributions system was not "well appearing enough" and that a "cosmetic change was needed" (A. 664). Accordingly, a new checking account was opened under the name "Long Island Public Affairs Club" and that account served as the vehicle for the contributions from May, 1970 to September, 1970. None of the participating officers was told he was a member of the Long Island Public Affairs Club or that the money he was turning over to Mrs. Jaeger was being deposited into that account (E.g., A. 307, A. 598).

In the fall of 1970 another change was implemented to further insure that the contributions "would appear to be made on behalf of individuals" (A. 674, A. 689). The Long Island Public Affairs Club account was closed and the participating officers were contacted each month and told to draw their $100 checks to a specified politician, political committee or political event. The officers testified that they did not choose the payees themselves, but merely wrote the checks as per the instructions they were given (E.g., A. 1218). The checks were collected by a junior officer named Arthur Chadwick and sent directly to the payee without being deposited into an account (A. 1034-1035). Chadwick kept detailed records of all monies received and expended (A. 1035-1053).

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[7] Of the approximately 27 officers contributing by early 1970 all but two received special $1700 raises. Those two, Patrick Clifford and Joseph Dutra, were deemed to be receiving salaries sufficient to afford to contribute without compensation.

Shortly after the "Arthur Chadwick system" was implemented, more officers were included so that by 1971 there were over forty (40) officers participating (Tr. 1221-1222). Most of the officers added to the system at this time were, likewise, given special contributions raises (Tr. 1223, A. 1188-1191).[8] The expanded contributions program continued under the "Arthur Chadwick system" until April, 1974 when the grand jury investigation began. Between 1968 and 1974 almost $300,000 in political contributions was generated.

2. The Critical Aspect of the Scheme

There are several aspects of the scheme described above which are critical to the issue raised here and which deserve to be highlighted. The first, and perhaps the most significant, is the conceded fact that the scheme to increase the salaries was devised because the officers were financially unable to contribute without being separately compensated for it. Thus, the defendant Dowd, who was the senior Vice President of Security National Bank, and the principal moving force behind the program, testified repeatedly that without the promised salary increases, the bank officers could not afford to make the contributions:

> "I spoke to several of my associates and we kicked around the subject of whether we could buy tickets and we agreed that if we would help the bank out we would, but we all had children and mortgages and did not feel that we can do much more than buy an occasional ticket." (A. 2025-2026).

* * * * *

[8] Six of the officers brought into the expanded contributions system in late 1970 and early 1971 tesitfied at trial. George Mause, A. 988-1026; Thomas Casey, A. 659-935; Michael Gargano, A. 1184-1207; Carmine Merolla, A. 1253-1301; Robert Doud, A. 936-987 and Ralph Groskoph, A. 1153-1183.

"I told him [Mr. Clifford] I understand he and Mr. Maass both brought these tickets out of their own pocket, but the rest of the officers wouldn't be able to do it financially * * *". (A. 2032).

* * * * *

"Mr. Maass and Mr. Clifford said they didn't need salary increases, they were paid enough and they would continue. They were doing it before making the $100 a month contributions. They were making the contributions out of their own pockets but they could understand the rest of the officers couldn't do it out of their own pockets.

The discussion came up as to how much of a raise. I suggested if we are going to ask the officers to substitute for the directors to contribute $1,200 a year and we'd have to increase the officers salaries $1,200 a year.

* * * * *

Then someone raised the question of if you gave someone a $1,200 increase, there was income taxes and a figure was arrived that would enable an officer to contribute up to $1,200 without being hurt, without having to hurt him financially, because we didn't have people overpaid." (A. 2039-2040).

Second, the officers who were solicited to make the contributions were assured that, as a result of the salary increases, the contributions would be made without "cost" to them (E.g., A. 244, A. 2063).

Third, although it was the intention of the officers that the salary increases were unconditional, and would never be rescinded, Mr. Dowd testified that none of the participants were so advised (A. 2281, 2283):

"Q. Did you ever tell a single officer that you introduced into this club that you are getting this raise and if you want to contribute one month and don't want to contribute for the rest of the years that raise stays with you?

A. No, sir, I didn't.

Q. Did you ever tell a single officer that you invited into this club that he could stop contributing at any time and keep the money?

A. No, sir, I didn't.

Q. You never told that to anyone, did you, sir?

A. No, sir.

* * * * *

Q. In fact the way that you told them they understood full well, didn't they, sir, that they were responsible for contributing $100 a month—

* * * * *

Q. Isn't that correct, sir?

A. Yes, sir."

Moreover, it was clear that the reimbursed officers were felt by the Security National Bank to be "morally committed" to make the contributions (A. 2421). And, indeed, of the forty some odd officers who were reimbursed, only three broke their commitment.[9]

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[9] Two other officers briefly halted payments, apparently after obtaining permission to do so (A. 2879), when they were financially strapped because of illness (A. 1019-1020, A. 1606).

C. The Defense

The sole defense upon which the Security National Bank relied was that the scheme was legal because the salary increases were intended to be permanent and the monies actually contributed was the money of the employees rather than the money of the bank. As the counsel for the Security National Bank stated his position (A. 2771):

> "Now, before I go and examine the evidence let me assure you I do not dispute the Government's contention that the salaries were increased so that contributions would not be a financial burden. Where the Government and the defendant's part is at the stage where the officers received the money. The Government contends that it remained the bank's. The defendants contend that it was the officers'."

Of course, in making this argument, even the bank's counsel was forced to admit that he was relying on a "fine technical distinction * * * between what is the bank's money and what is the officer's money" (A. 2795). Moreover, the statement that "[t]he Government contends that it [the salary increases] remained the bank's money", only fairly summarizes the position which we were forced to take in light of the district court's charge that the United States had to show that "the contribution charged in the specific count was actually made with bank funds" (A. 2825-2826). Our position actually was, as we argued in our mid-trial petition for a writ of mandamus (A. 36), and at other times (A. 2758-2759; Tr. 4787-4788), that if the "defendants consented to what in law constituted an indirect payment to a political campaign, it hardly matters whether somewhere in the process title to the money passed to a third person" (A. 54).

D. The Charge of the District Court

The issue about which this appeal principally revolves initially arose with regard to the issue whether the United States was entitled, in light of the advice of counsel defense urged by the individual defendants, to an instruction to the jury that, even if this defense was accepted, the individual defendants could still be found guilty of a non-wilful violation of Section 610 which was a misdemeanor. Indeed, it was during a colloquy on this issue that Judge Costantino initially indicated his acceptance of the theory of the defendants (A. 2751):

> "The Court: But it [the instruction to the jury] does of necessity call for what I call a two-fold type charge, if the jury finds that the monies that were given as salary increases became the monies of the employees, then it may go differently, whether there is a statute or no statute, because it is their money and they have a right to give it away. Now you don't have a problem under that situation of a violation of the statute because the money is theirs and anybody can do anything they want with their money. I don't think any law in America can change that, if it is your money you may do anything you wish."

Judge Costantino, relying on this view of the law ultimately refused to instruct the jury that they could convict the individual defendants of a non-wilful violation of Section 610. Thus he stated (A. 2754):

> "If the jury were to believe the defendants' testimony [on the advice of counsel], it would have to acquit the individual defendants of the felony. This Court must determine what effect

> the jury's belief in defendants' version would have on the misdemeanor violation, if charged. Although wilfulness is not an element of the misdemeanor violation, defendants can be convicted of the misdemeanor only if they knowingly caused the bank monies to be contributed. The statute does not assess strict liability regardless of scienter. Cf. United States against Finance Committee to re-elect the President, 507 F. Second 1194, 1197 (District of Columbia Circuit, 1974). If the jury believes defendants' testimony that they relied on counsel's opinion that salary raises become the property of officers and do not constitute bank money, then the jury could not convict the individual defendants of knowingly causing contributions of bank money."

The Solicitor General of the United States authorized a petition for a writ of mandamus to compel Judge Costantino to instruct the jury that the defendants could be convicted on the lesser included offense. We argued that (A. 54-55):

> "Th[e] conclusion [underlying his refusal to charge the lesser included offense] betrays a plain misapprehension of the basic elements of the offense; for if the defendants consented to what in law constituted an indirect payment to a political campaign, it hardly matters whether somewhere in the process title to the money passed to a third person. Indeed, the legislative history of Section 610 shows, beyond peradventure, that Congress intended that Section 610 apply where the conduit through whom the indirect contribution is made, actually makes the contribution with funds that are his.

* * * * *

> Accordingly, even if the defendants believe that monies contributed here were employees' money, it would be no defense to a charge of violating Section 610, and this is so with respect to both the greater and lesser included offense. The advice of counsel defense, to felony charge, is that the defendants—acting on the advice of counsel—were told that the scheme which they knowingly designed and executed did not violate Section 610; that defense is not applicable to the misdemeanor where no showing of wilfulness is required."

Moreover, citing Judge Costantino's comments quoted earlier, which accepted the theory of the defense, we warned that, unless Judge Costantino's view of the law was corrected, an acquittal on both the greater and lesser included offense would result (A. 56).

The petition for a writ of mandamus was denied, with the following brief statement (A. 57):

> "Although at first blush it would appear that it would not be inappropriate for the District Court to give the charge requested by the Government, mandamus is not an appropriate procedure in this case."

Although the writ of mandamus was filed at Judge Costantino's suggestion, so that he could have some guidance from this Court on the law (A. 2755), he proceeded to reject the guidance he did get (A. 58);[10] he declined to give the lesser included offense instruction and

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[10] In so doing he wrote (A. 58):

> "The Court of Appeals decision is entirely consonant with this court's first impression of this issue. After careful review and complete argument, however, this court determined that it would be inappropriate to so charge. Accordingly, this court adheres to its original decision."

he charged, despite our repeated claim that he was wrong (A. 2758-2759, Tr. 4787-4788), that in order to convict, the United States was obligated to prove, beyond a reasonable doubt, that "the contribution charged was actually made with bank funds" (A. 2825-2826).

E. The Effect of the Charge

The effect of the charge on the case was dramatic. Indeed, the record suggests that it was responsible not only for the acquittal of the Security National Bank, but the individual defendants as well. Although they had a carefully constructed advice of counsel defense, that defense was not only not supported by their counsel, whom they practically accused of lying (A. 2798-2799), but it was contradicted by their own conduct. They never advised the bank's Board of Directors, which had exclusive authority to approve all officer raises (Tr. 2214) that the purpose of the $1700 increase was to enable employees to make political contributions (Tr. 2217). When an employee wrote an anonymous letter to the Comptroller of the Currency complaining about the scheme, and the individual defendants were questioned about the scheme, the defendant Clifford, in the presence of the other two individual defendants, stated that "in no way are these officers reimbursed by the bank" (A. 2876). The defendant Clifford, in explaining his failure to apprise the Senior Bank Examiner who interrogated him about the salary increases, testified as follows (A. 1691):

> "Q. Was there any discussion with Mr. Langdon about reimbursement?
>
> A. Yes, I do not know whether the word "reimbursement" was used. The question came up,

> did these fellows ever get their money back. I thought—I assumed he meant did they get a hundred dollars back when they contributed a hundred dollars, and the answer was 'no', and we have done nothing with our expense accounts, things like that. We did not reimburse the officers."[11]

Moreover, at about the same time as the visit from the Senior Bank Examiner, the defendant Powell directed the personnel director of the Security National Bank, James Brogan, to "eliminate any reference" to the special contributions increases on the personnel records. As a result, Brogan caused asterisks, which had been placed on the "visi card" to mark the contribution raises to be erased (A. 479-480). The scheme, however, continued.

Accordingly, it is not surprising that the individual defendants requested that the district court begin his charge (as he did) by telling the jury (A. 2822-2823):

> "Before you consider the possible guilt of the defendants on Counts 2 through 10, you must first determine in accordance with instructions I shall give you, whether or not the bank itself made the contribution charged in each count."

This was, of course, an almost airtight defense, since the United States could not show, under the instructions

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[11] This dictionary definition of reimbursement, upon which the defendant Clifford relied, was apparently responsible for his acquittal of making a false statement to Mr. Langdon regarding compensation paid to the officers. Minutes after asking for a definition of the word "reimbursement" (Tr. 5392-5393), which the Senior Bank Examiner used in his report, which stated that Clifford denied that the officers were "in any way" reimbursed, the jury acquitted Clifford on the particular count; although it convicted him of making another false statement.

given by Judge Constantino, that contributions charged in each count were made by the Security National Bank itself. Moreover, the district court's charge, we believe, was also responsible for the jury verdict of acquittal on two of the nine counts in which contributions were actually—albeit accidentally—made with bank checks. It was conceded by us that the two payments by bank checks were due to a mistake and that as soon as it was discovered, the bank was repaid by contributions from its officers who had received salary increases for this purpose. Under these circumstances, given the evident mistake and the repayment of the bank by its officers with their "own money", the jury's verdict is understandable.

In short, a major criminal prosecution, important to the enforcement of a significant regulatory act of Congress, was aborted by what we shall show was a plainly erroneous charge on the law. While the error cannot be corrected as to the individual defendants, we shall proceed now to show that it can, at least, be corrected as to the Security National Bank and that this case can become what it was intended to be: a significant precedent in the congressional effort to limit illegal campaign contributions.

ARGUMENT

POINT I

The appeal from the judgment of the District Court is not barred by the Double Jeopardy Clause.

A. Introduction

It is now settled that an appeal from a judgment terminating a criminal prosecution is authorized by the Criminal Appeals Act, 18 U.S.C. § 3731, if it is not barred by the Double Jeopardy Clause; it matters not whether

the order or judgment is an acquittal on the general issue or a dismissal on some collateral legal issue. *United States* v. *Wilson*, 420 U.S. 332, 337-339 (1975); *Serfass* v. *United States*, 420 U.S. 377, 387 (1975); see, also, *United States* v. *DeGarces*, 518 F.2d 1156, 1175 (C.A. 2, 1975). Accordingly, the issue to be resolved here is whether the Double Jeopardy Clause bars an appeal from a judgment of acquittal entered in favor of a corporate defendant in a case in which the only "jeopardy" faced by the defendant was a fine.

Our argument that an appeal is not barred in these circumstances is based upon an analysis of the values which underlie the Double Jeopardy Clause. We show that these values largely reflect a concern for the effect a criminal trial has on an individual defendant facing the prospect of a possible loss of his liberty. They have no significant bearing in a case in which a corporate defendant faces a fine, a "jeopardy" which is no greater than it would face in an ordinary civil proceeding. Moreover, we show that this conclusion, that the Double Jeopardy Clause is inapplicable here, is likewise supported by its language and the obvious intent of the framers.

We do not, in making this argument, mean to suggest that a corporation is not entitled to protection from the more blatant evils from which the Double Jeopardy Clause affords protection. The doctrine of res judicata, if not the Due Process Clause, would afford protection against repeated efforts by the prosecution to obtain a conviction following an acquittal. The instant appeal does not involve such harassment. Here, we seek not a second crack at the apple but merely an opportunity to have a trial free of substantial legal error of the kind which the defendant here induced the district court to commit. While such review is barred by the Double

Jeopardy Clause where individual defendants have been tried and acquitted, the policies reflected by the Double Jeopardy Clause justify a contrary result where a corporation is a defendant.

B. The Language, History and Purpose of the Double Jeopardy Clause Show That It Is Not Applicable Here

1. The Double Jeopardy Clause, by its terms, provides that no "person" shall be subject for the same offense "to be twice put in jeopardy of life or limb." Since the defendant here is not a "person", and cannot be placed in jeopardy of life, limb or liberty, it is plain that if the Double Jeopardy Clause is to be construed to bar this appeal, it must be because, despite its language, there is clear evidence that it was intended to so apply or that an analysis of the policies it reflects leaves no room for a holding distinguishing corporate entities from persons.

The history of the Double Jeopardy Clause, however, like the companion Self-Incrimination Clause, shows that its framers "were interested primarily in protecting individual civil liberties" (*United States* v. *White*, 322 U.S. 694, 700 (1944). Indeed, at common law, a corporation was deemed to be incapable of committing a crime (*New York Central R.R.* v. *United States*, 212 U.S. 481, 482 (1909)). The manner in which it was to be treated in a criminal case, therefore, could hardly have concerned the Framers of the Bill of Rights. Thus a corporation has been held not to be a "person" entitled to invoke the privilege against self-incrimination. *United States* v. *White*, *supra*,) or to indictment by a grand jury (*United States* v. *Macklin*, 389 F. Supp. 272, 273 (E.D.N.Y. 1975), affirmed, 523 F.2d 193 (C.A. 2, 1975). Nor is it entitled to the same privacy protection accorded by the Fourth

Amendment's proscription against unreasonable searches and seizures. (*United States* v. *Morton Salt Co.*, 338 U.S. 632, 651-652 (1950)). So, too, it has been held that the "liberty" protected against deprivation without due process of law, "is the liberty of natural, not artificial persons". *Western Turf Association* v. *Greenberg*, 204 U.S. 359, 363 (1907); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

While we believe that both the language and history of the Double Jeopardy Clause provide persuasive support for the position which we urge here, an analysis of the basic values underlying the Double Jeopardy Clause likewise compels the conclusion that it is not applicable to corporations. See, Note, *Double Jeopardy and Corporation: "Lurking in the Record" and "Ripe for Decision"*, 28 Stanford Law Rev. 805, 817-827 (1976). Perhaps the most quoted expression of those values appears in *Green* v. *United States*, 355 U.S. 184, 187 (1957), where Mr. Justice Black observed:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility than even though innocent he may be found guilty."

Quite plainly these are considerations which are uniquely applicable to "individuals" who are in jeopardy of the loss of their liberty. This is the jeopardy that distinguishes a criminal case from a civil case. This is the jeopardy that causes us to be concerned about "enhanc-

ing the possibility" of convicting an innocent man. This is the jeopardy that causes a defendant to live in a continuing "state of anxiety and insecurity" and makes a trial the "ordeal" that it is for him. This is the jeopardy about which the Supreme Court recently spoke when, in holding that an unincorporated association was not entitled to a jury trial in a criminal contempt case, it observed (*Munoz* v. *Hoffman*, 422 U.S. 454, 477 (1975)):

> "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated. *From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different.* It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union" (emphasis supplied).[12]

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[12] The same "intrinsic difference" between imprisonment and fine also underlines the holding of the Supreme Court in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) that the right to counsel in misdemeanor cases attaches only where "actual deprivation of a person's liberty is involved" (407 U.S. at 40). The courts of appeals following *Argersinger* "have made it clear * * * that the *Argersinger* doctrine relieves an uncounseled defendant convicted for a misdemeanor only from the penalty of incarceration. The conviction itself survives, despite the absence of counsel, and the defendant is not entitled to post-conviction relief from collateral civil, non-confinement consequences." Note, *United States Courts of Appeals: 1973-1974 Term, Criminal Law and Procedure*, 63 Geo. L.J. 331, 476 (1975): see, also, *United States* v. *White*, 529 F.2d 1390 (C.A. 8, 1976).

Because of this intrinsic difference between a fine and imprisonment, and because by its very nature a corporation cannot suffer the uniquely personal emotional trauma which an individual tried for a crime faces, the policies underlying the Double Jeopardy Clause do not require a holding extending its protection beyond the scope of its language and beyond the intent of its framers.

2. The case law dealing directly with the issue presented here, whether the Double Jeopardy Clause is applicable to corporations, is sparse. The only court of appeals decision which has spoken directly to the issue is *United States* v. *Southern Railway Corp.*, 485 F.2d 309 (C.A. 4, 1973), where the court of appeals took "note", without further discussion, that "the Double Jeopardy Clause *** has been applied to corporations as well as natural persons." Only two cases were cited in support of this passing observation. *Fong Foo* v. *United States*, 369 U.S. 141 (1962) and *United States* v. *Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal., 1966). These cases, however, provide little in the way of reasoned or compelling support for a holding contrary to that which we urge here.

In *Fong Foo* v. *United States*, 369 U.S. 141 (1962), one of the defendants happened to be a corporation, but the issue of the applicability of the Double Jeopardy Clause to corporations was neither argued or considered by the Supreme Court. The fact that a corporation was one of the defendants benefiting from the holding in *Fong Foo*, that the Double Jeopardy Clause barred appellate review of a judgment of acquittal, does not render that case controlling or persuasive authority on the issue here raised. See *Stone* v. *Powell*, — U.S. —, 96 S. Ct. 3037, 3045, n.15 (1976).

United States v. *Armco Steel Corp.*, 252 F. Supp. 364, 368 (S.D. Cal. 1966) is the only case which contains any reasoned discussion of the issue. The discussion there, however, is not only unpersuasive, but is basically inconsistent with other holdings of the Supreme Court. There the district court, in holding that the Double Jeopardy Clause applied to corporations, relied on the facts (1) that corporations are included in the definition of "person" in both anti-trust statutes and all other acts and resolutions of Congress and (2) that because they own the corporation, natural persons would ultimately suffer if the penalties were imposed.

The flaws in this analysis are apparent. The fact that Congress has chosen to treat corporations as "persons" for the purpose of the anti-trust laws or other statutes is hardly determinative of the issue whether a "corporation" is a person within the meaning of the Double Jeopardy Clause. The holding of the Supreme Court that a corporation is not a "person" within the meaning of the Self-Incrimination Clause, which was ignored by the district court in *Armco*, provides ample authority, if any is necessary, for rejecting this simplistic analysis. As one commentator has aptly observed in commenting on the *Armco* opinion:

> "[C]onstitutional amendments are not acts of Congress; therefore, the definition of persons as used in congressional acts—so heavily relied on by Judge Hall—is not controlling. Assuming arguendo that simple rules of statutory construction were the proper basis for that decision, the result would necessarily be contrary to that reached in *Armco*, since the protections against self-incrimination and double jeopardy are both contained in the Fifth

> Amendment, and 'person' should be interpreted to have the same content for both. Therefore, the Supreme Court's carefully reasoned conclusion that only natural persons are entitled to claim a privilege against self-incrimination should also preclude corporations from receiving the protection afforded by the double jeopardy clause."

Note, *Double Jeopardy and Corporation, supra*, 28 Stamford Law Rev. at 815-816.

Moreover, the fact that individual stockholders will indirectly bear the cost of any penalty imposed on a corporation in a criminal case, hardly means that they have in any way been subjected to the kind of "jeopardy" against which the Double Jeopardy Clause affords protection. For them the penalty is the same whether the action is criminal or civil. They do not undergo the emotional trauma experienced by an individual who personally faces a criminal charge any more than they are personally incriminated by evidence which a corporation, denied the protection of the Self-Incrimination Clause, may be compelled to produce.

There is, in short, no reasoned or binding authority which precludes the result for which we argue here. As the author of the commentary cited earlier observed: "[T]he only federal case to have discussed the applicability of the Double Jeopardy Clause to corporations reached an unwarranted conclusion, so that the issue remains one of those questions that 'lurks in the record' and is 'ripe for decision'." Note, Double Jeopardy and Corporations, *supra*, 28 Stamford Law Rev. at 817.

3. We emphasize, in concluding our discussion of this issue, that the result we urge here will not leave a cor-

poration without protection against the blatant evil at which the Double Jeopardy Clause is principally aimed. The doctrine of *res judicata* (see *United States* v. *Oppenheimer*, 242 U.S. 85, 88 [1916]), if not the Due Process Clause (see *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844, 857-860 (C.A. 2, 1965), *certiorari denied*, 383 U.S. 913 [1966]) would certainly provide protection against the harassment of repeated attempts to obtain a conviction after a jury has acquitted. But here we do not seek a second trial simply to harass or "to do better second time" (*Brock* v. *North Carolina*, 344 U.S. 424, 429 (1953), concurring opinion of Frankfurter, *J.*). Here we ask no more than this: "[T]hat the case against [the defendant] shall go on until there shall be a trial free from legal error. * * * This is not cruelty at all, nor vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege * * * granted to the state * * * [involves] no seismic innovation. The edifice of justice stands, its symmetry to many, greater than before." *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937), Cardozo, *J.*

The United States, as shall be presently demonstrated, did not receive a fair trial because of critical errors of law made by the trial judge. Under these circumstances, as almost every disinterested commentator has argued, an appeal should not be barred by the Double Jeopardy Clause even where the defendant is a "person".[13] While

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[13] Friedland, *Double Jeopardy*, (1969), p. 310; Mayers and Yarborough, *Bix Vexari: New Trials And Successive Prosecutions*, 74 Harv. L. Rev. 1; Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486; Sigler, *Double Jeopardy*, p. 114 (1969).

the issue has been foreclosed by the Supreme Court as to individual defendants, a different result is justified here because a corporation is not a "person" and is not subject to the kind of "jeopardy" against which the Double Jeopardy Clause protects.

POINT II

The District Court erroneously instructed the jury on the elements of Section 610.

A. The United States Need Not Establish That A Contribution Was Actually Made With Bank Funds In Order to Establish A Violation of Section 610

The district court, as we have observed, charged the jury that in order to establish a violation of Section 610, it was necessary to show that "[t]he contribution charged in the specific count was actually made with bank funds." This charge is inconsistent with the language, history and purpose of Section 610.

Section 610, by its very terms, defines a contribution as including any "direct or indirect payment." The very essence of the scheme we have described here was an indirect payment of the kind which Congress anticipated. Indeed, the following colloquy from the congressional debates on the 1971 amendment to Section 610, which added the definitional phrase "direct or indirect payment", is particularly instructive (117 Cong. Rec., 91st Cong., 1st Ses. 43381):

> "Mr. Hays: I have one other question as to corporations, would the gentleman's amendment

> prohibit voluntary contributions by members of corporations if they were reimbursed sub rosa? Does the gentleman understand? In other words, we will say that John Doe is vice president of X corporation, and that he gave $500 to a fund, and the corporation then reimbursed him, say, with some kind of cover saying it was expenses or something. That would be prohibited if it were found out?
>
> Mr. Hansen of Idaho: That in my judgment would constitute a violation of law; in fact, a violation of law as it exists now, as an indirect payment."

In the case put by Representative Hays, the contribution was not actually made with bank funds, and yet it plainly was an indirect payment. The only difference between that indirect payment, and the present case, is that here, the salary increases were given in advance of payment rather than after the payments were made. But "this fine technical distinction", to use the words of trial counsel for the Security National Bank (A. 2795), is hardly of any significance. This is particularly so in light of the broad overall purpose of Section 610, which is to eliminate "the evils of the use of [corporate] money in political elections" and "to promote purity in the selection of public officials." (S. Rep. No. 3056, 59th Cong., 1st Sess., p. 2).

Quite obviously the "evil" at which Section 610 is aimed is as apparent in the scheme that was employed here as it would have been had the Security National Bank made direct payments. The officers were able to make the contributions to candidates selected by bank officials only because the Security National Bank gave

them the money to do so; and the Security National Bank financed the program in order to obtain the kind of advantages that this kind of money buys.[14] To sanction a program such as this, because the contributions charged in each count were not actually made with the bank's money, is to sanction a loophole in Section 610 which would vitiate its salutary effect and ignore its clear language.

B. The United States Need Not Establish That A Contribution Was Made With the Intent to Influence the Outcome of An Election In Order To Establish A Violation of Section 610

Up to this point, we concentrated our discussion of the charge on the error which we believe infected the entire trial. There was yet another error which was made which should be corrected if there is to be a retrial. The indictment contained two counts (Counts 4 and 14) which involved contributions which were made after an election but which were used to pay campaign expenses. Prior to trial, after extended argument, Judge Costantino decided that in order to establish a violation of Section 610, a particular contribution must have been made with the intent to influence an election (A. 31), although he declined to dismiss the post-election counts after being advised that there was no proof other than the fact of the contribution itself to show an intent to influence the election (A. 2882).

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[14] It is of no consequence that the Security National Bank did not intend to penalize officers who broke their "moral commitment" to make the contributions (A. 2421). As a practical matter, few officers who really were concerned about their advancement would feel free to break such a commitment, particularly since they were not informed that they were free to do so, and, of course, Section 610 prohibits the use of economic injury to coerce political contributions.

Judge Costantino's charge as to this aspect of Section 610 may not have been harmful on pre-election contributions because he agreed to charge that, regardless of the motive for the contribution, "if the contribution was made to a political committee with the knowledge that it was to be used in an election campaign, then [you may find] that the contribution was made with the requisite intent to influence the particular election" (A. 2829).

On the other hand, his charge on the post-election contributions, which is correct if an intent to influence the election is required, was fatal. Thus he told the jury (A. 2829):

> "Post-election contributions can be made in connection with an election. To find such a contribution you must find either by direct or circumstantial evidence or by inference that there was an agreement or understanding prior to the election to do so, and that is after considering all the facts in evidence in the case." [15]

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[15] This charge was completely inconsistent with the view Judge Costantino took of the law before trial in declining to dismiss the post-election counts. At that time, he stated (A. 2882):

> "In reference to count 15 the Government has indicated that it has no direct proof of pre-election agreement to contribute to Mayor Beame's campaign. The Court must therefore decide whether this lack of proof requires dismissal of count 15. It is concluded a dismissal would be improper. It is conceivable that a jury might infer from the fact of the contribution itself and from the surrounding circumstances that the requisite specific intent was present."

The requirement that a contribution be made with intent influence an election is also wholly inconsistent with the language, history and purpose of Section 610. The definition of a contribution or expenditure contained in Section 610 provides that the term "shall include" any direct or indirect payment made "in connection with any election"; it does not require that it be made with an intent to influence the election. Indeed, such an intent is wholly irrelevant to the "evil" at which Section 610 is aimed. Here, again, if the district court's construction of Section 610 is sustained, another emasculating loophole will have been created.

The only arguable support for Judge Costantino's construction of Section 610 comes from Section 591. Section 591(e), prior to its most recent amendment [P.L. 93-443, Section 101(f)(2)], provided that when used in various sections of Title 18, including Section 610, the term "contribution" means various activities, including contributions "made for the purpose of influencing the nomination for election, or election, of any person to federal office."

The definition has been construed merely to require

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[16] One of the post-election counts involved a $5,000 payment to the campaign of Mayor Beame. The invitation to "Mayor Beame's Birthday Party", the medium through which the funds were raised, which was received by the Security National Bank and which was obtained from its files, specifically advised potential contributors that (A. 2903): "The proceeds will be used to dispose of recent campaign deficits." Moreover, the card to be returned with the contribution (A. 2904) expressly required the following acknowledgment: "I understand that the law prohibits your accepting monies from Corporations, City Officials or City Employees." The law referred to is presumably Section 460 of the New York Election Law, which is the state counterpart of 18 U.S.C. § 610.

that a particular activity proscribed within the definition, be partisan in nature, as distinguished from a non-partisan activity. *Ash* v. *Cort*, 496 F.2d 416 (C.A. 3, 1975), reversed on other grounds, 422 U.S. 66 (1975). This test was met here. More significantly, however, Section 591(e) does not contain the exclusive definition of the term "contribution" for the purpose of defining the reach of Section 610. For, as we have noted, Section 610 itself contains a supplemental definition which provides:

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift or money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable ordinary course of business) to any candidate, campaign committee, or political party or organization, *in connection with any election to any of the offices referred to in this section.* [emphasis supplied].

This definition, which was added by the same Congress that adopted Section 591(e), would be meaningless if Section 591(e) was deemed to contain the exclusive definition of the term. More significantly, since Section 591(e) deals exclusively with federal election contributions it would mean that the long standing prohibition in Section 610 against contributions to local elections would have been repealed. Yet it is apparent from the Conference Committee Report (117 Cong. Rec., 92 Cong., 1st Sess., 46799), explaining the effect of the definition contained in Section 610, that Congress intended to retain the prohibition against such contributions.[17] It is

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[17] The Conference Committee Report reads as follows:

"Section 305 of the House amendment amended section

[Footnote continued on following page]

thus plain, we submit, that the definition contained in Section 610, which does not contain the requirement of Section 591(e), that the contribution be made with an intention to influence an election for federal office, must be read to supplement that definition.[18]

In summary, we believe that there is no basis for the instruction given by Judge Costantino that a contribution given by a national bank does not violate Section 610 unless it is made with an intent to influence the election.

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610 of title 18 of the United States Code, relating to contributions or expenditures by national banks, corporaions, or labor organizations to add a new paragraph defining the phrase 'contribution or expenditure' to include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in such action. *In the case of a contribution or expenditure by a national bank, or by a corporation organized by authority of any law of Congress, Section 610 refers to 'any political office'.* In The case of a contribution or expenditure by any corporation whatever, or by any labor organization, Section 610 refers to the offices of presidential and vice presidential electors; Senator; and Representative in, or Delegate or Resident Commissioner to the Congress.

* * * * *

Conference substitute.—The conference substitute is identical with the House amendment except that the phrase 'contribution or expenditure' does not include a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business." [Emphasis added].

[18] Indeed, we note that in an apparent effort to resolve any confusion on this score, Congress amended the introductory sentence of Section 591 to make its definitional terms applicable "[e]xcept as otherwise specifically provided." [P.L. 93-443, Section 101(f)(3)].

CONCLUSION

The judgment of acquittal should be reversed and a new trial should be ordered.

Respectfully submitted,

Dated: August 6, 1976

DAVID G. TRAGER,
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EDWARD R. KORMAN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 24th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLANT of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John W. Castles, III, Esq.
Lord, Day & Lord, Esqs.
25 Broadway

New York, N. Y. 10004

Evelyn Cohen

Sworn to before me this
24th day of Aug. 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
Notary Public, State of New York
No. 24-4504625
Qualified in Queens County
Term Expires March 30, 1977

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355